

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

7-29
77-6073

To be Argued by
ANDREW J. KILCARR

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-6073

MOBIL OIL CORPORATION, GULF OIL CORPORATION, SHELL OIL COMPANY and
STANDARD OIL COMPANY OF CALIFORNIA,

Plaintiffs-Appellees,

—against—

FEDERAL TRADE COMMISSION and MICHAEL PERTSCHUK, Chairman, PAUL RAND
DIXON, Member, M. ELIZABETH HANFORD DOLE, Member, CALVIN J. COLLIER,
Member and DAVID A. CLANTON, Member and CAROL M. THOMAS, Secretary; as
officers of the FEDERAL TRADE COMMISSION,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK

APPELLEES' BRIEF

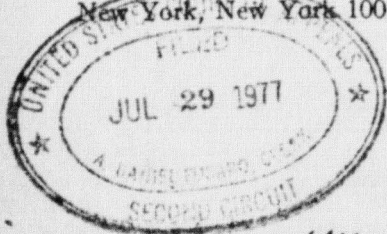
Of Counsel:

CHARLES F. RICE
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017

ANDREW J. KILCARR
VINCENT TRICARICO
Donovan Leisure Newton & Irvine
1666 K Street, N.W.
Washington, D.C. 20006

THOMAS R. TROWBRIDGE III
Donovan Leisure Newton & Irvine
30 Rockefeller Plaza
New York, New York 10020

Counsel for Appellee
Mobil Oil Corporation



(Appearances of Counsel Continued on Inside Front Cover)

Of Counsel:

GEORGE W. WOLBERT
S. R. VANDIVORT
A. M. MINOTTI
Shell Oil Company
One Shell Plaza
Houston, Texas 77001

J. WALLACE ADAIR
KEITH E. PUGH, JR.
Howrey & Simon
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Counsel for Appellee
Shell Oil Company

JESSE P. LUTON, JR.
JOHN E. BAILEY
P.O. Box 2100
Houston, Texas 77001

Counsel for Appellee
Gulf Oil Corporation

GEORGE A. SEARS
RICHARD W. ODGERS
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California 94104

Counsel for Appellee
Standard Oil Company of California

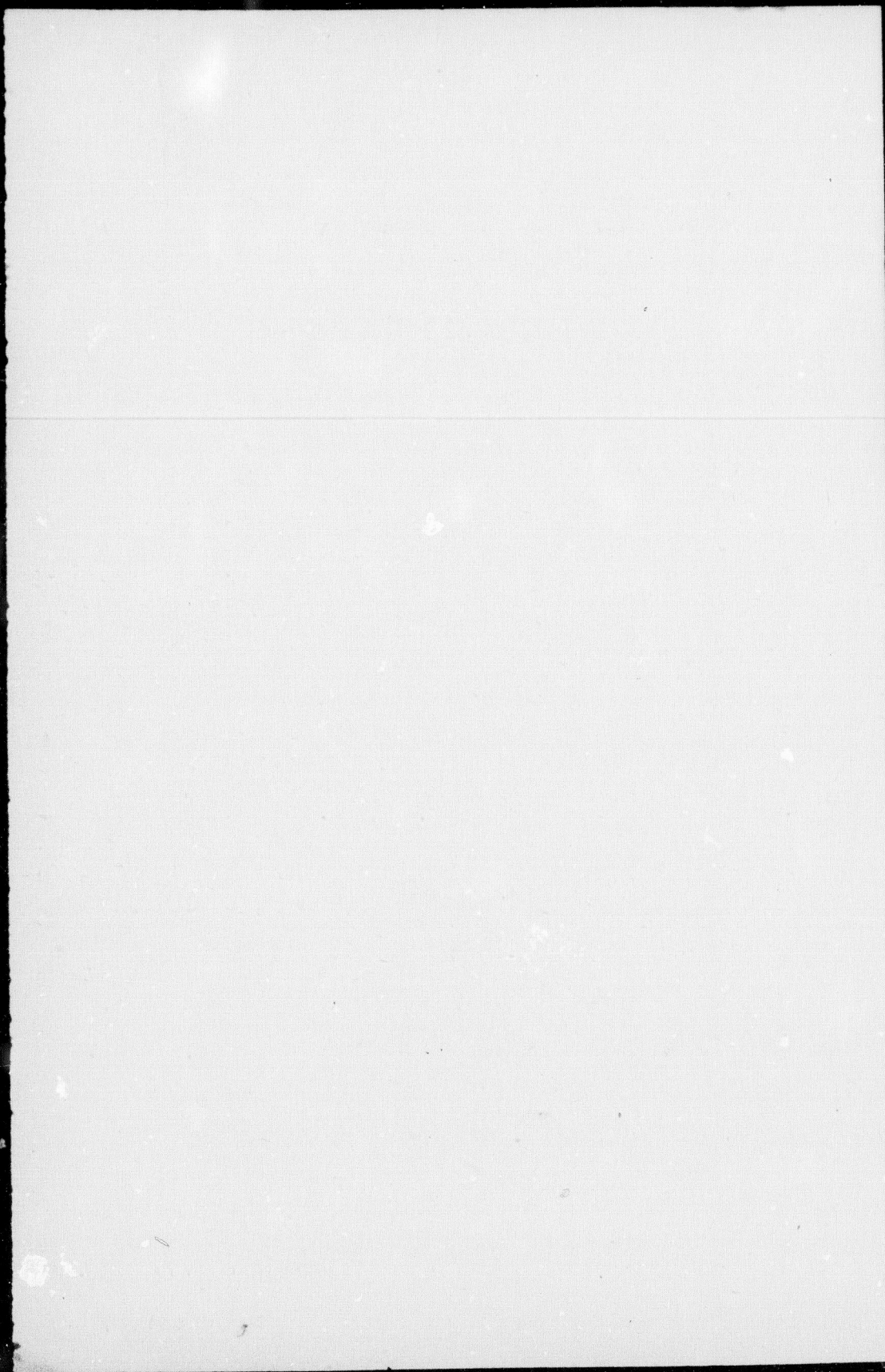


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Counterstatement of Issues Presented	4
Counterstatement of The Case	5
A. Administrative Proceedings	5
B. District Court Proceedings	7
Argument	8
Summary	8
 POINT I—Federal Trade Commission Adjudicatory Proceedings Are Not Exempt From Section 102 (2)(C) Of NEPA	10
A. The Express Language And Legislative His- tory of NEPA Demonstrate That Section 102(2)(C) Applies to <i>All</i> FTC Actions Which Are “Major” And Which “Significantly Affect The Quality Of The Human Environment”	11
1. <i>NEPA Is Not Restricted To Environmental Management</i>	11
2. <i>The FTC’s Claimed Exemption Of Its Adjudicatory Proceedings Is In Conflict With Its Own Procedures And Controlling Authorities</i>	13
B. The Commission Has Failed To Demonstrate That All Of Its Adjudications In General Or <i>Exxon</i> In Particular Meet Established Stand- ards For Exemption From Section 102(2)(C)	19
 POINT II— <i>Exxon</i> Is A Major Federal Action Sig- nificantly Affecting The Quality Of The Human Environment	25
 POINT III—The District Properly Held That An Impact Statement is Required At This Stage Of The <i>Exxon</i> Proceedings	27

	PAGE
A. NEPA Requires That An Impact Statement Be Prepared Now	27
B. The Relief Proposed In <i>Exxon</i> Has Been Sufficiently Stated For Purposes Of An EIS	29
C. The Requirements Of Section 102(2)(C) May Not Be Evaded By An Artificial Separation Of Of The Commission From Its Staff	37
D. Delay In The Preparation Of An EIS Until Relief Is Ordered Will Result In An Irreversible And Irretrievable Commitment Of Resources	40
POINT IV—Plaintiffs Have Sustained Injury In Fact Which Is Within The Zone Of Interests To Be Protected By NEPA And Have Standing To Maintain This Action	45
Conclusion	50

TABLE OF AUTHORITIES

Cases

<i>Aberdeen & Rockfish R.R. v. Scrap</i> , 422 U.S. 289 (1975) ("SCRAP II")	28n., 42, 43, 46n.
<i>Arizona Public Service Co. v. Federal Power Commission</i> , 483 F.2d 1275 (D.C. Cir. 1973), <i>reconsideration subsequent to remand</i> , 490 F.2d 783 (D.C. Cir. 1974)	15n.
<i>Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission</i> , 449 F.2d 1109 (D.C. Cir. 1971)	8n., 16, 21, 28, 43
<i>Chelsea Neighborhood Associations v. United States Postal Service</i> , 389 F. Supp. 1171 (S.D.N.Y.), <i>aff'd</i> , 516 F.2d 378 (2d Cir. 1975)	17
<i>Chemical Leaman Tank Lines, Inc. v. United States</i> , 368 F. Supp. 925 (D. Del. 1973)	48, 49
<i>City of New York v. United States</i> , 337 F. Supp. 150 (E.D.N.Y. 1972)	15n.
<i>Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation</i> , 531 F.2d 637 (2d Cir. 1976)	37n.

	PAGE
<i>Duke City Lumber Co. v. Butz</i> , 382 F. Supp. 362 (D.D.C. 1974), <i>aff'd</i> , 539 F.2d 220 (D.C. Cir. 1976), <i>cert. denied</i> , 45 U.S.L.W. 3463 (U.S. January 11, 1977)	49n.
<i>Environmental Defense Fund, Inc. v. Corps of Engineers</i> , 325 F. Supp. 749 (E. D. Ark. 1971)	36n.
<i>Environmental Defense Fund, Inc. v. Morton</i> , 420 F. Supp. 1037 (D. Mont. 1976)	36n.
<i>Flint Ridge Development Co. v. Scenic Rivers Association</i> , 426 U.S. 776 (1976)	8, 8n., 20
<i>Gifford-Hill & Co., Inc. v. Federal Trade Commission</i> , 523 F.2d 730 (D.C. Cir. 1975) (<i>per curiam</i>), <i>aff'g</i> 389 F. Supp. 167 (D.D.C. 1974)	17, 18, 24n., 46, 48
<i>Greene County Planning Board v. Federal Power Commission</i> , 455 F.2d 412 (2d Cir.) <i>cert. denied</i> , 409 U.S. 849 (1972)	15n., 17, 22n., 28, 43, 46
<i>Harlem Valley Transportation Association v. Stafford</i> , 500 F.2d 328 (2d Cir. 1974)	15n., 17, 28, 43
<i>Hiram Clarke Civil Club, Inc. v. Lynn</i> , 476 F.2d 421 (5th Cir. 1973)	22n.
<i>Jicarilla Apache Tribe of Indians v. Morton</i> , 471 F.2d 1275 (9th Cir. 1973)	36
<i>Jones v. District of Columbia Redevelopment Land Agency</i> , 499 F.2d 502 (D.C. Cir. 1974), <i>cert. denied</i> , 423 U.S. 937 (1975)	45
<i>Kalur v. Resor</i> , 335 F. Supp. 1 (D.D.C. 1971)	16
<i>Kleppe v. Sierra Club</i> , 427 U.S. 390 (1976)	29, 33, 34, 34n., 35, 43
<i>Louisiana v. Federal Power Commission</i> , 503 F.2d 844 (5th Cir. 1974)	15n., 16, 48
<i>Monroe County Conservation Council, Inc. v. Volpe</i> , 472 F.2d 693 (2d Cir. 1972)	4, 8n., 20
<i>National Helium Corp. v. Morton</i> , 455 F.2d 650 (10th Cir. 1971)	9, 26, 46, 47, 48, 49
<i>National Petroleum Refiners Association v. Federal Trade Commission</i> , Civil Action 1180-71 (D.D.C. July 1, 1975)	27n.

<i>Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission</i> , 547 F.2d 633 (D.C. Cir. 1976)	32n.
<i>Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission</i> , 539 F.2d 824 (2d Cir. 1976), <i>cert. granted</i> , 45 U.S.L.W. 3651 (U.S. March 29, 1977)	9, 31, 41, 42
<i>New York v. Nuclear Regulatory Commission</i> , 550 F.2d 745 (2d Cir. 1977)	44
<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267 (1974)	15
<i>Pack v. Corps of Engineers</i> , 428 F. Supp. 460 (M.D. Fla. 1977)	49n.
<i>Robinson v. Knebel</i> , 550 F.2d 422 (8th Cir. 1977)	49n.
<i>Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission</i> , 481 F.2d 1079 (D.C. Cir. 1973)	9, 12, 30, 31, 44n.
<i>Sierra Club v. Mason</i> , 351 F. Supp. 419 (D. Conn. 1972)	37n.
<i>Sterling Drug, Inc. v. Federal Trade Commission</i> , 450 F.2d 698 (D.C. Cir. 1971)	37n.
<i>Transcontinental Gas Pipe Line Corp. v. Federal Power Commission</i> , 488 F.2d 1325 (D.C. Cir. 1973), <i>cert. denied</i> , 417 U.S. 921 (1974)	15n.
<i>United States v. SCRAP</i> , 412 U.S. 669 (1973) ("SCRAP I")	46n.

Statutes:

Administrative Procedure Act, 5 U.S.C. §§ 551, <i>et seq.</i>	23
Freedom of Information Act, 5 U.S.C. § 552(b)(5)	37n.
Government In The Sunshine Act, 5 U.S.C. § 552b	23
5 U.S.C. § 702	48
5 U.S.C. § 704	48
Federal Trade Commission Act, § 5, 15 U.S.C. § 45	15, 21
National Environmental Policy Act, 42 U.S.C. §§ 4321, <i>et seq.</i>	1, 2, <i>et passim</i>

42 U.S.C. § 4331(a)	11
42 U.S.C. § 4331(b)	10n.
42 U.S.C. § 4332	10n., 21
42 U.S.C. § 4332(2)(C)	1, 2, <i>et passim</i>
42 U.S.C. § 4335	16n.

Regulations

10 C.F.R. §§ 51.1, <i>et seq.</i> (1976)	15n.
14 C.F.R. §§ 312.1, <i>et seq.</i> (1977)	15n.
Federal Trade Commission Rules of Practice, 16 C.F.R. Chapter 1	
Rules 1.81—1.86, 16 C.F.R. §§ 1.81—1.86	9, 39
Rule 1.82(a), 16 C.F.R. § 1.82(a)	14, 39
Rule 1.82(d), 16 C.F.R. § 1.82(d)	1, 2, <i>et passim</i>
Rule 1.83(a), 16 C.F.R. § 1.83(a)	39
Rules 1.83(b)—(d), 16 C.F.R. § 1.83(b)—(d)	40
Rule 1.84(a), 16 C.F.R. § 1.84(a)	40
Rule 3.51, 16 C.F.R. § 3.51	35
18 C.F.R. §§ 2.80, <i>et seq.</i> (1976)	15n.
Guidelines of the Council on Environmental Quality, 40 C.F.R., Part 1500	22
49 C.F.R. §§ 1108.1, <i>et seq.</i> (1976)	15n.

Miscellaneous

House of Representatives Conference Report No. 91- 765, 91st Cong., 1st Sess., <i>reprinted in</i> [1969] U.S. Code Cong. & Ad. News 2767	19
Senate Report No. 91-296, 91st Cong., 1st Sess., <i>reprinted in</i> 115 Cong. Rec. (Part 14) 19010 (July 10, 1969)	12, 27n.
115 Cong. Rec. 19009 (July 10, 1969) (Remarks of Sen. Jackson)	13

U

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6073

MOBIL OIL CORPORATION, GULF OIL CORPORATION, SHELL OIL COMPANY and
STANDARD OIL COMPANY OF CALIFORNIA,

Plaintiffs-Appellees,

—against—

FEDERAL TRADE COMMISSION and MICHAEL PERTSCHUK, Chairman, PAUL RAND
DIXON, Member, M. ELIZABETH HANFORD DOLE, Member, CALVIN J. COLLIER,
Member and DAVID A. CLANTON, Member and CAROL M. THOMAS, Secretary; as
officers of the FEDERAL TRADE COMMISSION,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK

APPELLEES' BRIEF

Preliminary Statement

This appeal by the Federal Trade Commission (hereinafter "Commission" or "FTC") is from two decisions of the United States District Court for the Southern District of New York, Honorable John M. Cannella, Judge relating to the FTC adjudicatory proceeding *In the Matter of Exxon Corporation, et al.*, Docket 8934 ("Exxon"). In the first,¹ the Court held that FTC adjudicatory proceedings are not exempt from § 102(2)(C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C), and invali-

1. Opinion and Order entered March 2, 1977. A. 72-124. Reported at 430 F. Supp. 855 ("A" refers to the Joint Appendix filed in connection with this appeal).

dated § 1.82(d) of the FTC's Rules as inconsistent with that statute. A. 94.² The Court also held:

since the relief proposed in *Exxon* would operate to "restructure the petroleum industry and alter the manner in which oil, a depletable natural resource, is produced, distributed and used," the Court finds that *Exxon* is a "major federal action significantly affecting the quality of the human environment" as that phrase is used in § 102(2)(C) of NEPA. The FTC does not really dispute this. A. 112.

The Commission was ordered to begin compliance with § 102(2)(C) "immediately" by preparing a draft environmental impact statement ("EIS"). A. 12.

In the second decision from which the Commission appeals³, the Court set a deadline on the Commission's continuing noncompliance with NEPA by ordering it to prepare and distribute a draft EIS by September 12, 1977 and to submit a status report by July 11, 1977. A. 173.

Thus, the Court below held that the FTC does not have preferred status as regards NEPA. It required the FTC to begin the process of making the environmental implications of *Exxon* a part of that proceeding and, by ordering the preparation of a status report, the Court assumed a supervisory role over that process.

In this appeal, the Commission seeks a determination that § 102(2)(C) of NEPA, which applies without qualification to "all" federal agencies and to "every" major federal action with significant environmental effects, does not mean what it says.

It argues that adjudicatory proceedings are exempt from NEPA's EIS requirements because they are nowhere mentioned in the statute. But NEPA's language is broad and neither includes nor excludes particular types of federal action.

2. Rule 1.82(d), 16 C.F.R. § 1.82(d), provided in pertinent part that:

"Nothing in this procedure shall be construed as stating or implying that § 102(2)(C) of NEPA applies to: . . . any adjudicatory proceedings commenced by the Commission."

3. Supplemental Memorandum Decision dated March 14, 1977. A. 169-174.

The FTC argues that application of NEPA's EIS requirements would somehow interfere with its prosecutorial discretion:

While requiring the Executive to take environmental factors into consideration when deciding whether to prosecute a case may not be inconsistent with the exercise of its prosecutorial discretion, it is clear that requiring an EIS to be prepared and circulated is inconsistent with the executive's prosecutorial functions. (p. 21)⁴.

It is thus the position of the FTC that it should be free to consider the environment in the manner of its own choosing. NEPA, however, specifies the manner in which consideration is to be given to the environment and the Commission cannot be permitted to rewrite the statute to suit its perception of its responsibilities. Moreover, any argument that the FTC cannot prepare an EIS and, at the same time, prosecute *Exxon*, a proceeding for which the FTC annually budgets millions of dollars, is absurd.

Finally, assuming that NEPA does apply to its adjudicatory proceedings, the FTC argues that it should not apply to *Exxon* until the relief stage when the Commission proposes relief. But at that point in the proceedings there will be no proposal, only an order of relief by the agency. As the decision-making process within the agency will then be terminated, there is nothing which could be the subject of an EIS.

If, in its adjudicatory proceedings, the Commission is permitted to dispense with compliance with § 102(2)(C)—the only "action-forcing" provision of NEPA—those proceedings will be exempt from NEPA altogether. However, this Court has imposed a rigid standard on those agencies which would exempt any or all of their activities from § 102(2)(C):

Congress directed that NEPA, which provided for an impact statement, was to be implemented to "the

4. Page references are to Appellants' Brief, dated July 15, 1977.

fullest extent possible." 42 U.S.C. § 4332. In using this language, it was not creating a loophole to avoid compliance, but rather was stating that NEPA must be followed *unless some existing law applicable to the agency made compliance impossible* [citing legislative history]. *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 699 (2d Cir. 1972) (emphasis added).

The Commission has failed to meet the standard established by this Court in order to be excused from the EIS requirements of NEPA. It has neither shown nor attempted to show that compliance would be impossible and the District Court's decisions should therefore be affirmed.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether Federal Trade Commission adjudicatory proceedings are exempt from § 102(2)(C) of NEPA, notwithstanding that compliance with that Section by the Commission neither clearly nor unavoidably conflicts with its authority or obligation to enforce the Federal Trade Commission Act?
2. Whether *Exxon*, the largest adjudicatory proceeding ever instituted by the Commission and in which the Commission seeks to restructure the petroleum industry, altering the manner in which oil, a depletable natural resource, is produced, distributed and used, is a "major federal action significantly affecting the quality of the human environment"?
3. Whether § 102(2)(C) permits the Commission to postpone preparation of an EIS in *Exxon* until after it has made an "irreversible and irretrievable commitment of resources" which will inevitably preclude meaningful consideration of environmental concerns?
4. Whether damage to the environment in which plaintiffs and their employees work and upon which they depend for their livelihood is "injury in fact" and within the

"zone of interests" to be protected by NEPA and thus provides plaintiffs with standing to maintain this action?

COUNTERSTATEMENT OF THE CASE

A. Administrative Proceedings

This action arises out of the largest adjudicative proceeding ever undertaken by the Federal Trade Commission — *Exxon*. The *Exxon* complaint was authorized and issued on July 18, 1973 by the FTC and for 1977 alone, over \$6 million has been budgeted to the prosecution of this one case. A. 129. This proceeding is now four years old and the Administrative Law Judge presiding in *Exxon* has conservatively estimated that its discovery stage alone will continue for at least five years. A. 192.

The targets of this tremendous commitment of the Commission's resources are eight major oil companies,⁵ four of which are the plaintiffs in this action.⁶ The complaint challenges a host of acts and practices allegedly engaged in by the oil companies throughout most of the eastern half of the United States, and, by charging that respondents have "maintained a noncompetitive market structure" (A. 213), it also attacks the very structure of the petroleum industry.

After the Commission issued the *Exxon* complaint, the proposed relief was identified by its staff on February 22, 1974. A. 217-21.⁷ Having conducted a "detailed analysis of the competitive problems facing the petroleum industry" (A. 218), the staff identified four goals⁸ for *Exxon*

5. Mobil Oil Corporation ("Mobil"), Gulf Oil Corporation ("Gulf"), Shell Oil Company ("Shell"), Standard Oil Company of California ("Socal"), Atlantic Richfield Company; Standard Oil Company (Indiana); Texaco Inc.; and Exxon Corporation.

6. Mobil, Gulf, Shell, and Socal.

7. Complaint Counsel's Prediscovery Statement.

8. "Effective relief should (1) reduce refinery concentration; (2) reduce barriers to entry in refining; (3) make the industry more responsive to consumer demands with respect to product mix; and (4) create conditions and incentives which promote open market transactions." A. 217.

and proposed specific relief including divestiture of 40 to 60 percent of respondents' refinery capacity, pipeline divestiture, a ban against future refinery acquisitions and limitations on joint ventures and "processing arrangements." A. 217-21.

On October 17, 1975, the Administrative Law Judge, *sua sponte*, certified to the Commission his recommendation that the Commission consider withdrawal of the *Exxon* complaint. The Commission was asked to consider whether the proceeding, particularly in light of the proposed relief, was consistent with national policy. A. 233-48. On October 23, 1975, the Commission issued an order stating that it has "considered the Law Judge's recommendation and has determined that the complaint should not be withdrawn."⁹ This action was taken over the dissent of Commissioner Nye who noted that breaking up the oil companies is a concept central to the *Exxon* complaint and questioned whether that relief was in the public interest.

Because the relief proposed in *Exxon* would, if effectuated, have a substantial and direct effect upon the environment, the respondents in *Exxon* filed a motion to require complaint counsel to file an environmental impact statement. It was their position there, as it is here, that that relief would constitute a "major Federal action significantly affecting the quality of the human environment" within the meaning of § 102(2)(C) of NEPA.

Respondents' motion and request for certification were denied by the Administrative Law Judge on February 5, 1975. A. 21. In his order, the Law Judge stated that he was following the dictates of § 1.82(d) of the Commission's Rules of Practice. A request for leave to appeal was denied by the Law Judge on February 25, 1975. A petition for extraordinary review, filed with the Commission with respect to both the need for an impact statement in *Exxon*

9. A copy of this order, Commissioner Nye's dissent thereto, and the certification of the Administrative Law Judge are attached to the Affidavit of Thomas R. Trowbridge III, submitted in support of Appellees' opposition to the Government's application for a stay pending appeal, dated June 16, 1977. ("Trowbridge affidavit").

and the invalidity of § 1.82(d), was denied on April 9, 1975.
A. 22.

B. District Court Proceedings

On June 6, 1975, plaintiffs commenced this action with the filing of a complaint seeking a declaration that § 1.82 (d) is invalid, a declaratory judgment that *Exxon* is a "major federal action significantly affecting the quality of the human environment" and an order requiring defendants to prepare and file a statement setting forth the environmental impact of the relief proposed in *Exxon*.

Plaintiffs filed a motion for summary judgment on August 1, 1975 (A. 17) and on September 11, 1975, defendants moved to dismiss or, in the alternative, for summary judgment. A. 27. By Order dated March 2, 1976, the District Court granted plaintiffs' motion, declaring § 1.82(d) to be null and void. The Court also directed the FTC to begin complying with § 102(2)(C) by preparing a draft EIS, finding that *Exxon* is a "major federal action significantly affecting the quality of the human environment".

Following the entry of this Order, plaintiffs moved to enjoin prosecution of *Exxon* pending the filing of a draft impact statement. On March 14, 1977, the Court below denied plaintiffs' application but ordered the FTC to prepare and distribute a draft EIS by September 12, 1977 and to submit a progress report by July 11, 1977. In so doing, the Court sought to ensure "that preparation of an EIS [would] be a top priority for the FTC." A. 173.

By Order To Show Cause dated April 25, 1977, the Commission applied to the District Court for a stay pending appeal. That application was denied but on June 21, 1977, this Court granted a stay and set an expedited schedule for briefing and argument.

ARGUMENT

Summary

The FTC's claim that its adjudicatory proceedings are immune from § 102(2)(C) (Point I) finds no support in either the language of NEPA or its legislative history, as interpreted by the Supreme Court,¹⁰ this Court,¹¹ and other courts.¹² The only federal actions which are not subject to § 102(2)(C) requirements are those which either are not "major" or do not "significantly affect the quality of the human environment." *Exxon*, the cost of which is already measured in millions of dollars and which is aimed at a wholesale restructuring of the petroleum industry, forecloses any suggestion that all Commission adjudications are either not major or without environmental significance.

Consistent with the express language of the Act that compliance is required "to the fullest extent possible", exemptions from the § 102(2)(C) requirements are not lightly implied. Thus, § 102(2)(C) procedures may not be avoided unless compliance would create a "clear and unavoidable conflict" in statutory authority, *Flint Ridge Development Co. v. Scenic Rivers Association*, 426 U.S. 776 (1976). There is no such conflict here.

In holding that *Exxon* is a "major federal action significantly affecting the quality of the human environment" (A. 112), the Court observed that the "FTC does not really dispute this." *Id.* There is no basis for dispute. (Point II). The Commission concedes this point. Its alternative argument to the *per se* exemption claim is not that *Exxon* is exempt but rather that an EIS is not required at this stage of the proceeding. However, those contentions—that the relief proposed is not yet sufficiently "concrete"

10. *Flint Ridge Development Co. v. Scenic Rivers Association*, 426 U.S. 776 (1976).

11. *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2d Cir. 1972).

12. *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971).

to warrant an EIS now (pp. 24-33) and that an EIS is not required until the Commission, as opposed to its staff, proposes relief (pp. 33-35)—are not supportable.

First, the relief proposed is specific on its face. Second, the Commission may not “shirk [its] responsibilities under NEPA by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry.’” *Scientists’ Institute For Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). Third, the Commission has endorsed the relief proposed in *Exxon*, and recognizes in its own rules (16 C.F.R. §§ 1.81-1.86) that action proposed by the staff is a “proposal” within the meaning of NEPA, requiring compliance with that statute.

The Commission’s final argument in support of putting off the preparation of an EIS to a later date—that the Court used an impermissible balancing test to determine that an EIS must be prepared immediately (pp. 35-40)—is likewise unavailing. The Court did not engage in a balancing test but instead determined, consistent with this Court’s ruling in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 539 F.2d 824 (2d Cir. 1976), *cert. granted*, 45 U.S.L.W. 3651 (U.S. March 29, 1977), that preparation of an EIS is not to be delayed to the point where resources will be “irreversibly and irretrievably” committed to the proposal. A. 91.

Finally, the Commission’s assertion that plaintiffs lack standing to maintain this action is not supported by the cases or authorities cited. Consistent with the leading case, *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971), the District Court properly concluded that plaintiffs have sustained injury in fact and that their interest in the environment is within the zone of interests to be protected by NEPA.

POINT I

FEDERAL TRADE COMMISSION ADJUDICATORY
PROCEEDINGS ARE NOT EXEMPT FROM SECTION
102(2)(C) OF NEPA

Defendants do not claim that *Exxon* alone is exempt from § 102(2)(C).¹³ They contend that *all* FTC adjudicatory proceedings are exempt from that section (Point I) regardless of whether they are "major" or will "significantly affect the quality of the human environment."

The Commission in essence argues that once it elects to adjudicate, it is immune from the action-forcing provisions of NEPA and any inquiry as to the applicability of these provisions is foreclosed. The Commission apparently regards its responsibilities as more important than those of other agencies and has declared that, in its adjudications, it cannot be bothered with NEPA. It is precisely this kind of arrogant disregard of the environment that NEPA is designed to prevent.

13. NEPA requires that *all* agencies of the Federal Government "use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources" (42 U.S.C. § 4331(b)) to insure appropriate consideration of environmental values.

To that end, § 102 of the Act, 42 U.S.C. § 4332, specifies procedures designed by Congress to insure that Federal agencies consider the environmental consequences of their actions. Those procedures apply to a proposed agency action regardless of the magnitude of the action involved or the extent of its environmental impact. Additionally, when major Federal actions with significant environmental effects are proposed, the more stringent procedure of § 102(2)(C) is required. That provision requires consultation with other agencies having jurisdiction over or special expertise with respect to the environmental impact involved and directs that all agencies of the Federal Government shall:

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action, . . .

To support its claim for blanket immunity, the Commission contends first, that based upon the language of NEPA and its legislative history, the Act was intended to "focus" on environmental management oriented activities rather than adjudication, and second, that if required to comply with § 102(2)(C), the Commission will be unable to enforce the Federal Trade Commission Act ("FTCA"). Neither of these arguments is supportable and there is no basis for the FTC's claimed exemption from § 102(2)(C).

A. The Express Language And Legislative History of NEPA Demonstrate That Section 102(2)(C) Applies to All FTC Actions Which Are "Major" And Which "Significantly Affect The Quality Of The Human Environment"

1. NEPA Is Not Restricted To Environmental Management

The Commission asserts that, based upon the language of NEPA and its legislative history, that Act was intended to "focus upon prospective issues of environmental management in executive agency policy and program decision making." (p. 13). This construction of § 102(2)(C) is of the Commission's own making. It is supported neither by the language of NEPA nor its legislative history.

By the enactment of NEPA, Congress made environmental protection a matter of national policy:

[I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . , to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. 42 U.S.C. § 4331(a).

As the District Court noted, with the passage of NEPA, mere payment of lip service to the environment no longer suffices:

Wary that the federal agencies would not implement the policies of NEPA on their own, Congress inserted an "action-forcing" provision [§ 102] into the Act. A. 111.

This broad triggering clause reflects "the Act's attempt to promote an across-the-board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency." *Scientists Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1088 (D.C. Cir. 1973).

The Commission cites no language from the Act or its legislative history which even colorably supports the thesis that § 102(2)(C) is limited to prospective environmental management and policymaking and excludes FTC adjudications. There is none and, quite to the contrary, the legislative history reveals that management of the environment was but one of the purposes of NEPA.

The purpose of S.1075, the National Environmental Policy Act of 1969, is to establish, by Congressional action, a national policy to guide Federal activities, which are involved with or related to the management of the environment *or which have an impact on the quality of the environment*. S. Rep. No. 91-296, 91st Cong., 1st Sess., *Reprinted in* 115 Cong. Rec. (Part 14) 19010 (July 10, 1969) (emphasis added).

In the face of the complete lack of support for its position, the Commission attempts to shift the burden to plaintiffs to demonstrate that "[i]f Congress had intended to subject the enforcement of public interest statutes such as the Federal Trade Commission Act to the EIS requirements of NEPA, it would have clearly indicated as much in the language of the Act and its legislative history." (p. 18). The fact is, however, that Congress has so indicated. The language of § 102(2)(C) of NEPA is broad, unambiguous and applies to "every" major federal action with significant environmental effects. Nothing in the legislative history reveals otherwise.

**2. *The FTC's Claimed Exemption Of Its
Adjudicatory Proceedings Is In Conflict
With Its Own Procedures And Con-
trolling Authorities***

The Commission concedes, as it must, that NEPA's mandate to consider environmental consequences applies to its adjudicatory proceedings. (p. 15). It also concedes that requiring the Executive to consider environmental impact in its prosecutorial decisions "may not be inconsistent with the exercise of its prosecutorial discretion". (p. 21). Nevertheless, the Commission argues that the EIS requirement of § 102(2)(C) is inapplicable. This position misconstrues the nature of the EIS requirement and is directly contrary to legislative intent in enacting NEPA.

The EIS requirement of § 102(2)(C) is procedural in nature. That section sets forth the manner in which agencies are to give formal consideration to the environment whenever the action proposed is both major and environmentally significant. The section was enacted to ensure that, in significant cases, environmental consideration is accomplished in a meaningful and reasoned manner, utilizing the resources of all federal agencies with expertise in the field. The action forcing procedures of § 102(2)(C) were enacted to ensure that an agency's "consideration" of the environment would not be perfunctory. As Senator Jackson, a chief sponsor of NEPA, noted:

The bill directs that all Federal agencies conduct their activities in accordance with [the] goals [set forth in Section 101], and provides "action forcing" procedures to insure that these goals and principles are observed. 115 Cong. Rec. 19009 (July 10, 1969).

Thus, while the FTC concedes that it must consider the environmental consequences of its adjudications, § 102(2)(C) requires nothing more than that that consideration be formal and meaningful.

The Commission attempts to brush aside the requirements of § 102(2)(C) by suggesting that it either has com-

plied or will comply with all of the other provisions of NEPA (pp. 15, 16, 21, 31). It has indicated, however, how it views its NEPA obligations and the restricted manner in which it proposes to discharge them:

The Government does not contend that Section 102(2)(c) imposes no duties upon an agency prior to its making a report or [recommendation] on a proposal for action. The statute contemplates that environmental factors will be considered during the evolution of the report or recommendation through its requirement that prior to preparing the EIS, the responsible official "shall consult with and obtain the comments of any Federal Agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." . . . *In fact, the Commission has fully complied with this interim requirement by consulting with the CEQ. The CEQ formally advised the Commission that in its judgment, NEPA does not apply to law enforcement adjudications of the Commission.*¹⁴

Solicitation of the CEQ's views as to whether NEPA applies to FTC adjudications is hardly the form of inter agency consultation concerning the environment which NEPA directed take place.

While the Commission claims a blanket exemption for its adjudications, another provision of its Rules, § 1.82(a), 16 C.F.R. § 1.82(a), does require an impact statement for a rule which constitutes "a major action significantly affecting the quality of the human environment."

The Commission fails to explain why NEPA should be taken into account in its rulemaking but not its adjudicatory proceedings. The Commission argues that application of the EIS requirement to its adjudicatory proceedings "would . . . preclude the Commission's fulfillment of its mandate to enforce the Federal Trade Commission Act . . . [and] would in addition facilitate noncompliance by those

14. Memorandum of Law in Support of the Government's Application for a Stay Pending Appeal, May 6, 1977, at 34n. (emphasis supplied).

who seek to violate the Act and whose unlawful activity it was intended to prohibit." (pp. 21-22). It would do no such thing. However, even if the Commission's rationale is assumed, *arguendo*, to be valid, it should apply to Commission rulemaking as well since the Commission has historically maintained that it may formulate policy and enforce Section 5 of the FTCA, 15 U.S.C. § 45, either through adjudication or rulemaking. In many cases, the same result can be achieved through either procedure. *Cf.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). Moreover, if the FTC requirement of impact statements in rulemaking is related to the general applicability of rules, the same reasoning requires the preparation of an EIS in *Exxon* which, unlike most FTC adjudications, is industry wide in its scope.

The Commission appears to stand alone in the anomalous posture which it takes toward NEPA. Other agencies apply § 102(2)(C) procedures to both their adjudicative and rulemaking proceedings. These include the Interstate Commerce Commission,¹⁵ the Federal Power Commission,¹⁶ the Civil Aeronautics Board,¹⁷ and the Nuclear Regulatory Commission.¹⁸ Moreover, § 102(2)(C) has in several instances been held applicable to other types of adjudications. The cases include decisions to authorize actions such as the abandonment of a railway line,¹⁹ curtailment of natural gas sales,²⁰ the construction of a power facility,²¹ or construction of a pipeline.²²

15. 49 C.F.R. §§1108.1, *et seq.* (1976).

16. 18 C.F.R. §§280, *et seq.* (1976).

17. 14 C.F.R. §§312.1, *et seq.* (1977).

18. 10 C.F.R. §§51.1, *et seq.* (1977).

19. *See Harlem Valley, Transp. Ass'n. v. Stafford*, 500 F.2d 328 (2d Cir. 1974); *City of New York v. United States*, 337 F. Supp. 150 (E.D.N.Y. 1972).

20. *See Louisiana v. FPC*, 503 F.2d 844, 875 (5th Cir. 1974); *Transcontinental Gas Pipe Line Corp. v. FPC*, 488 F.2d 1325, 1330 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

21. *See Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

22. *See Arizona Pub. Serv. Co. v. FPC*, 483 F.2d 1275, 1282 (D.C. Cir. 1973) *reconsideration subsequent to remand*, 490 F.2d 783 (D.C. Cir. 1974).

Although the Commission's argument would require a determination that the admittedly legitimate interest of the public and the Commission in the enforcement of the FTCA must override any other public interest, the fact is that all of these other agencies enforce statutes and carry out policies whose importance to the nation's economic, social and physical well-being is equivalent to those entrusted to the FTC. All of these agencies apply § 102(2)(C) procedures to both their adjudicative and rulemaking proceedings. This is consistent with the intent of the statute which provides that its policies are "supplementary to those set forth in existing authorizations of Federal agencies."²³ NEPA simply provides that, in addition to their other obligations, Federal agencies must consider the effect which their actions might have on the environment. As the Fifth Circuit stated in *Louisiana v. Federal Power Commission*, 503 F.2d 844, 875-76 (5th Cir. 1974):

NEPA's purpose is to make an agency consider the environmental effects of its actions: the impact statement requires the agency fully to disclose that evaluation thus proving the evaluation has been made and warning interested parties of the probable environmental effects. . . .

Thus FPC's primary obligations remain the same; NEPA merely adds a secondary responsibility by mandating that FPC consider the environment in carrying out its statutorily mandated duties.

The courts have swiftly rejected previous attempts by agencies to argue the inapplicability of NEPA to them or to certain of their programs. For example, the Atomic Energy Commission was sharply criticized by the Court in *Calvert Cliffs'*, *supra*, for enacting procedures which conflicted with NEPA: "We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act". (449 F.2d at 1117).

In *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971) the Army Corps of Engineers argued unsuccessfully that it did not

23. 42 U.S.C. § 4335.

have to prepare environmental impact statements under circumstances which were specified in the Corps' own regulations. Similar contentions of the United States Postal Service and the Interstate Commerce Commission were disposed of in the same manner. *Chelsea Neighborhood Associations v. United States Postal Service*, 389 F. Supp. 1171 (S.D.N.Y.), *aff'd*, 516 F.2d 378 (2d Cir. 1975); *Harlem Valley Transportation Ass'n v. Stafford*, 500 F.2d 328 (2d Cir. 1974).

Although it did not claim that it was exempt from NEPA, the FPC was roundly criticized by the court in *Greene County Planning Board v. FPC*, *supra*, 455 F.2d at 424, for the casual manner in which it viewed its NEPA obligations:

The Commission's "hands-off" attitude is even more startling in view of the explicit requirement in NEPA that the Commission "recognize the worldwide and long-range character of environmental problems" and interpret its mandate under the Federal Power Act in accordance with the policies set forth in NEPA . . . Any doubt about the intent of these provisions is obviated by the following statement in the Senate Report accompanying the Act:

"Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969).

The decision of the United States Court of Appeals for the District of Columbia Circuit in *Gifford-Hill & Co., Inc. v. Federal Trade Commission*, 523 F.2d 730 (D.C. Cir. 1975) (*per curiam*), *aff'g* 389 F. Supp. 167 (D.D.C. 1974) is not, as the Commission asserts, "directly contrary" to the decision of the District Court (p. 2). That case does not support the Commission's argument on the merits that NEPA does not apply to any FTC adjudicatory proceedings.

In that case, Gifford-Hill's acquisition of a mining company was challenged in an FTC proceeding in which the proposed relief included divestiture. Citing the possible proliferation of strip mines resulting from divestiture, Gifford-Hill moved for a preliminary injunction asking, *inter alia*, that the Commission's prosecution be enjoined until it had filed an EIS. The District Court never reached the merits. It determined that Gifford-Hill had failed to show any of the elements necessary for the issuance of a preliminary injunction and denied the motion. It also found the prospect of additional strip mines "exceedingly speculative" and not "realistically related to any decision in the case before the FTC." *Id.*, 389 F. Supp. at 175.

The court concluded, however, that "NEPA was intended to apply to Federal actions having a reasonably substantial relationship to the quality of the environment". *Id.* at 174. It implied that while that relationship was not involved in the *Gifford-Hill* adjudication, those in which it is involved will be subject to § 102(2)(C):

Divestiture, at least in the situation here presented, is not that sort of action which will have an effect on the environment. *Id.* at 175.

The facts in *Elkton* are dramatically different from those in *Gifford-Hill* and it is undeniable that the relief which is the Commission's objective would have a major impact on the nation's environment. As Judge Cannella observed, "beyond the point of procedural similarity, *Gifford-Hill* is clearly distinguishable from the case presently before the Court." A. 84.

The Court of Appeals affirmed *per curiam* but "[w]ithout considering the merits of the NEPA complaint." 523 F.2d at 731. It found that Gifford-Hill lacked standing and that, in any event, the suit was premature as no action by the agency reviewable under the Administrative Procedure Act had occurred.

The determination below that the FTC may no longer look the other way when significant environmental conse-

quences such as those proposed in *Exxon* attend its major actions is fully supported by the language of § 102(2)(C), its legislative history and the cases interpreting both.

B. The Commission Has Failed To Demonstrate That All Of Its Adjudications In General Or *Exxon* In Particular Meet Established Standards For Exemption From Section 102(2)(C)

The unambiguous language of § 102(2)(C) and the purposes behind both that Section and NEPA require exemptions to be narrowly construed and not lightly implied. As the District Court held, "an agency hoping to except certain of its actions—on their face covered by the section—from the impact statement process bears a heavy burden." A. 97.

Section 102 requires that all agencies comply with its provisions relating to the preparation of impact statements "to the fullest extent possible" and the legislative history of that provision defines with precision those few instances in which an agency will be excused from its duty to comply with § 102(2). The statement of the managers on the part of the House concerning the purpose in adopting the phrase "to the fullest extent possible" establishes that:

The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in . . . [Section 102(2)] *unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible.* . . . Thus, it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance. H.R. Conference Rep. No. 91-765, 91st Cong.,

1st Sess., reprinted in [1969] U.S. Code Cong. & Ad. News 2767, 2770 (emphasis added).

In *Flint Ridge Development Co. v. Scenic Rivers Ass'n.*, 426 U.S. 776, 788 (1976), the Supreme Court concluded that compliance with § 102 could be excused if it would result in "a clear and unavoidable conflict in statutory authority." The issue before this Court is the same as that defined by the Supreme Court in *Flint Ridge*:

And so the question we must resolve is whether, assuming an environmental impact statement would otherwise be required in this case, requiring the Secretary to prepare such a statement would create an irreconcilable and fundamental conflict with her duties under the Act. *Id.*

Requiring the FTC to comply with the EIS requirements of NEPA in adjudicative proceedings such as *Exxon*, which are "major" and in which the relief sought would "significantly affect the quality of the human environment," will create no "irreconcilable or fundamental" conflict with the Commission's duties under the FTCA. The Commission makes no showing to the contrary.

It attempts to meet the test established by NEPA as interpreted by the Supreme Court by first reducing its stringency. The Commission asserts that "the effect of Judge Cannella's construction of NEPA's EIS requirement is to create a clear and unavoidable conflict with the Federal Trade Commission Act by impairing the Commission's capacity to fulfill its statutory mandate to enforce the anti-trust provisions of that Act." (p. 18) (emphasis supplied). The short answer, of course, is that even if the Commission could demonstrate that its ability to enforce the FTCA would be "impaired" by complying with § 102(2)(C), the standard of a "clear," "unavoidable," "irreconcilable," or "fundamental" conflict simply would not be met. As this Court recognized in *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 699 (2d Cir. 1972) an exemption from § 102(2)(C) requires a greater showing than mere difficulty or impairment:

Congress directed that NEPA, which provided for an impact statement, was to be implemented to "the fullest extent possible." 42 U.S.C. § 4332. In using this language, it was not creating a loophole to avoid compliance, but rather was stating that NEPA must be followed unless some existing law applicable to the agency made compliance impossible [citing legislative history].

The D. C. Circuit in *Calvert Cliffs'*, *supra*, 449 F.2d at 1115, was likewise unpersuaded by a claim of difficulty in administering a statute: "Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section [102] of its fundamental importance."

Thus, NEPA, its legislative history, and relevant case law all establish that an agency must demonstrate that its statutory mandate *precludes* preparation of an EIS or consideration of the environment. Section 5 of the FTCA, 15 U.S.C. § 45, under which the Commission is prosecuting *Exxon*, expressly provides that a complaint may issue only upon a finding, *inter alia*, that such a complaint would be "to the interest of the public." Thus, when read in conjunction with the Congressional declaration of public interest in the environment found in NEPA, § 5 not only fails to preclude formal consideration of environmental consequences, it *requires* such consideration.

The Commission is even unable to meet the standard it has set for itself—"impairment" of its statutory obligations. It claims that its capacity to fulfill its statutory duty would be impaired "specifically" because its "prosecutorial discretion would be restricted." (p. 18). This is simply not true. NEPA leaves the decision whether or not to proceed entirely in the hands of the agency and the District Court so observed:

The Court recognizes that its ruling today may signal an occasional decision not to prosecute antitrust violators for the sake of preserving our environment. It must be remembered, however, that the decision whether to go forward notwithstanding adverse environmental impact rests with the Commission. It is

their obligation, not the Court's, to weigh alternatives.
A. 111.

The argument that the FTC "would be required to subject its cases to public review, collateral attack and judicial scrutiny even before the commencement of the proceeding and prior to the discovery of the information necessary to a proper adjudication" (pp. 18-19) is without basis.²⁴

The EIS requirements are activated not in the case of every adjudication but only in those rare instances, such as *Exxon*, in which the proceeding is a "major federal action significantly affecting the quality of the human environment." In those situations, the agency may not keep the environmental implications of its actions to itself and the proceeding is quite properly subject to public review.

The Commission also argues that "[t]o infer that NEPA was intended to require an EIS before a regulatory agency could issue a complaint to enforce the laws of the United States would be inconsistent with the traditional judicial deference accorded the executive branch in its prosecutorial capacity". (p. 19). This argument is beside the point as are the "separation of powers" cases on which the Commission relies. (pp. 19-21). Whether a court may or should interfere with the Executive's discretionary decision to institute a criminal prosecution is not at issue. As recognized by the Court below, the decision to institute an adjudicatory proceeding is within the Commission's discretion. NEPA does not *prevent* the Commission from proceeding; it simply sets forth a procedure which must be followed when a proposed proceeding will have significant environmental consequences.

24. The Commission's summary (p. 19 n.*/) as to what the CEQ guidelines "require" when a draft EIS is to be circulated is inaccurate. CEQ guidelines do not "require" anything because the CEQ lacks statutory authority to promulgate regulations which have the binding force of law. The guidelines are only advisory, not mandatory. *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412, 421 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *Hiram Clarke Civil Club, Inc. v. Lynn*, 476 F.2d 421 (5th Cir. 1973). All of the CEQ guidelines quoted by the Commission use the hortatory "should" or "it is recommended," not the mandatory "shall" or "must," as the Commission asserts.

A court no more interferes with an agency's prosecutorial discretion by requiring it to comply with NEPA's procedures than it does by requiring an agency to comply with the procedures of any other statute, *e.g.*, the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, or the Government In The Sunshine Act, 5 U.S.C. § 552b, both of which impose limitations and place added responsibilities on agencies and on the manner in which they carry out their primary statutory duties.²⁵

Stripped to its essentials, the argument is that, if an adjudication will have significant environmental implications, in order to avoid the effort of analyzing those implications, the FTC may decide not to proceed with the adjudication. As the Court below determined, that is as it should be.

The Commission next asks this Court to consider the "implications of [the District Court's] decision for other law enforcement proceedings before administrative tribunals and federal courts". (p. 23). The Commission expresses concern that the Department of Justice might be

25. The Commission's reliance on the Council on Environmental Quality's endorsement of the proposition that NEPA's EIS requirement does not apply to Commission adjudications provides no assistance. (pp. 22-23, citing CEQ advisory opinion at A.32). As the District Court recognized (A.105-110), the CEQ's memorandum, which is of no legal effect, is severely flawed in both its reasoning and conclusions. For example, the CEQ recognizes (A.56-57) that in some cases, divestiture will have significant environmental consequences. That recognition should end the discussion; impact statements are required in those instances. The CEQ, however, believes that the adjudicatory framework is an adequate substitute for § 102(2)(C) procedures. But NEPA specifies the procedures which must be followed and the CEQ's opinion that Commission proceedings can accomplish the same result is both irrelevant and erroneous. For example, it is claimed that the environment can be handled by the parties like any major issue. A.57. The environment, however, is not an issue which only affects the litigants. It has profound implications for the public at large and that is no doubt why § 102(2)(C) requires that other agencies, with jurisdiction over or expertise with respect to the impact involved, be consulted and that comments be obtained from them before an EIS is prepared. That is no doubt also why the EIS itself, along with the comments and views of those agencies, must be made available to the public. The CEQ completely ignores this and is content to leave matters significantly affecting the environment to the adversaries and their efforts to persuade the Law Judge.

compelled to comply with § 102(2)(C) in antitrust proceedings tried in a judicial forum and that "the enforcement activities of other regulatory agencies could be stymied notwithstanding the magnitude of violation which they seek to redress."²⁶ *Id.*

The issues before the Court are not nearly as far reaching as the Commission implies. If this Court affirms the decision below, it will hold only that all FTC adjudications are not exempt from § 102(2)(C) and that that section applies to *Exxon*. This result would subject an adjudication of the FTC and other agencies to the procedural requirements of § 102(2)(C) only if a particular proceeding is "major" and seeks relief which would "significantly affect the quality of the human environment." Moreover, in the case of adjudications which do come within § 102(2)(C), as long as an agency complies with that section, its ability to proceed with its adjudication is in no way restricted by NEPA.

Thus, the "implications" of the District Court's decision are hardly ominous. In rejecting the CEQ's argument that application of § 102(2)(C) to enforcement proceedings would create an imbalance in agency decision making, the District Court accurately described the limited implications of its decision:

Prosecutorial discretion involves a complex mix of discrete factors; after the passage of NEPA, the addition of the "environmental" ingredient of course changed the composition of the mix but did not eliminate any of the other factors. The fact that this "environmental" ingredient is the product of a more lengthy

26. To support this grave forecast the Commission relies only on dicta from the District of Columbia District Court's decision in *Gifford-Hill & Co., Inc. v. FTC*, 389 F. Supp. 167, 176 (D.D.C. 1974), *aff'd*, 523 F.2d 730 (D.C. Cir. 1975). It adds little weight to defendants' argument. That court's concern with the possibility that NEPA could be exploited by respondents in agency proceedings was obviously influenced by Gifford-Hill's inability to show even a colorable potential environmental injury upon which to claim standing.

and formal process does not necessarily give it the dominating effect feared by the CEQ. A. 107.²⁷

For all of the reasons discussed above, it is submitted that the District Court correctly held that FTC adjudicatory proceedings are not exempt from § 102(2)(C) and that § 1.82(d) of the Commission's Rules is therefore invalid.

II

EXXON IS A MAJOR FEDERAL ACTION SIGNIFICANTLY AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT

If this Court affirms the holding below that § 1.82(d) is invalid, the next inquiry is whether *Exxon* is "major federal action significantly affecting the quality of the human environment" and therefore subject to § 102(2)(C) procedures.

The District Court had little difficulty with this issue and held that § 102(2)(C) applied,

since the relief proposed in *Exxon* would operate to "restructure the petroleum industry and alter the manner in which oil, a depletable natural resource, is produced, distributed and used," . . . A. 112.

As the Court noted, the Commission did "not really dispute this". *Id.* Emphasizing instead the purported inappropriateness of compliance with NEPA at this stage (Points II-IV), the Commission does not dispute this conclusion on appeal either. There are, moreover, no grounds for dispute.

Nothing the FTC has ever done even approaches the magnitude of *Exxon*, either in terms of resources committed or in terms of objectives (restructuring of the petroleum industry). The environmental implications of *Exxon* are equally awesome.

27. The lack of any basis for the exemption the FTC claims is underscored by the District Court's analysis (A. 91-103) of cases in which the actions of certain agencies were held to be exempt from the requirements of § 102(2)(C). These cases involved either emergency acts or other situations where time is of the essence, or actions taken by the Environmental Protection Agency whose decision-making necessarily includes environmental consideration.

The Commission charges that plaintiffs have been responsible for substantial misallocations and waste of society's scarce resources.²⁸ It must be assumed that the relief proposed will attempt to remedy this situation. It is also claimed that respondents divert investment funds from domestic to foreign crude exploration and production.²⁹ Relief touching on this area would result in a change in domestic exploration and production, with a direct effect on the depletion of natural resources. This intention to alter the way in which society's resources are used in and of itself supplies sufficient need for an impact statement. As the court stated unequivocally in *National Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971):

It is undeniable that [NEPA] compels the Department [of Interior] to comply with its provisions when action is being taken having to do with a depletable resource.

Other environmental consequences which would flow from the relief proposed are equally significant.³⁰ Divestiture of refineries and pipelines could stimulate construction of new refineries and pipelines. Elimination of joint ventures in the transportation of crude oil and refined products would result in increased transportation and decreases in efficiency. Finally, the elimination of joint ventures in both onshore and offshore lease bidding will lead to increased drilling activities. Each of these changes in petroleum industry operations would have a substantial impact on the environment.

For the reasons cited in the District Court's decision and those discussed above, it is submitted that this Court should affirm the District Court's holding that *Exxon* is a "major

28. Memorandum in Support of Plaintiffs' Motion for Summary Judgment, August 1, 1975 at 17, citing Complaint Counsel's Prediscovery Statement.

29. *Id.*

30. The relief proposals are set forth in Point III B, *infra*.

federal action significantly affecting the quality of the human environment."³¹

III

THE DISTRICT COURT PROPERLY HELD THAT AN IMPACT STATEMENT IS REQUIRED AT THIS STAGE OF THE EXXON PROCEEDINGS

A. NEPA Requires That An Impact Statement Be Prepared Now.

The timing of an EIS in *Exxon* must be viewed in light of the terms and purposes of NEPA. NEPA was enacted to ensure that environmental concerns receive meaningful consideration in all Federal decisions at all levels of the decision-making process³²—hence § 102(2)(C)'s concern with proposals for federal action rather than final action. Given this emphasis on influencing the decision-making process, that provision directs the preparation of an EIS to be "include[d] in every recommendation or report on proposals for . . . major Federal actions . . ." and expressly provides that "... such statement . . . shall accompany the proposal *through the existing agency review processes.*" 42 U.S.C. § 4332(2)(C) (emphasis added). In *Exxon*, a Federal agency has proposed major, environmentally significant action that is presently in the existing agency review processes. The District Court's holding that an EIS for

31. The impact of a restructuring of the petroleum industry by the Commission would certainly be far greater than that of a Commission rule regarding the posting of gasoline "octane" ratings at service station pumps, and yet the latter action has already been held by a court to demand compliance with NEPA's environmental mandates. See *National Petroleum Refiners Association v. Federal Trade Commission*, Civil Action 1180-71 (D.D.C. July 1, 1975), a case which involved Commission rule-making proceedings rather than adjudicatory ones, a distinction of no relevance to the physical environment.

32. *E.g.*, the Senate Report states:

The committee believes that it is necessary to move ahead to define the "environmental" desires of the American people in operational terms that the President, *Government agencies at all levels*, the courts, private enterprise, and the public can consider and act upon. S. Rep. No. 91-296, 91st Cong., 1st Sess., as reprinted in 115 Cong. Rec. (Part 14) 19010, 19012 (July 10, 1969) (emphasis added.)

Exxon was required immediately is thus consistent with the terms and purposes of NEPA, as well as the teaching of the Supreme Court:

Where an agency initiates federal action by publishing a proposal and then holding hearings on the proposal, the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing.³³

That the District Court's holding with regard to the timing of the *Exxon* EIS is correct is also confirmed by the holdings in *Green County*, *Harlem Valley*, and *Calvert Cliffs*, *supra*. Finally, as discussed *infra*, the Commission's own rules implementing NEPA recognize that an EIS should be prepared for consideration at the initial decision-making level.

NEPA's express terms and purposes, its legislative history and applicable case law all confirm the accuracy of the District Court's holding that an EIS must be prepared for consideration at the initial decision-making level, now, while the proceedings are before the Administrative Law Judge.

The Commission, nevertheless, argues that even if its adjudicatory proceedings are not exempt from the requirements of § 102(2)(C), "Judge Cannella erred in ordering the preparation of an EIS at the present stage of *Exxon*." (p. 14). In support of this contention, the Commission argues that: (1) the relief proposed is "speculative," not "concrete" (pp. 24-33); (2) the Commission itself has yet to propose any relief (pp. 33-35); and (3) there will be no irreversible and irretrievable commitment of resources if preparation of an EIS is delayed until a violation of Section 5 is found by the Commission. (pp. 35-40). Each of these arguments is without merit and provides no basis for reversing the District Court's order to the Commission to begin complying "immediately" with NEPA's EIS requirement. A. 112.

33. *Aberdeen & Rockfish R. R. v. SCRAP*, 422 U.S. 289, 320 (1975).

B. The Relief Proposed In *Exxon* Has Been Sufficiently Stated For Purposes Of An EIS.

The Commission first argues that given the "absence of any concrete proposal of relief," the preparation of an EIS in *Exxon* now "would constitute an unrealistic and useless effort." (p. 25). Equating the relief proposed in *Exxon* with "mere contemplation" of action (*Id.*), the Commission contends that under *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), the EIS requirement of NEPA has not been triggered. The Commission has mischaracterized the nature of the relief proposed in *Exxon* and its strained attempt to force this case within the ruling in *Kleppe* does not succeed.

The mere identification of the relief proposed in *Exxon* confirms its specificity. The Commission proposes:

- (1) Divestiture of 40 to 60 percent of respondents' refinery capacity in the relevant market;³⁴
- (2) Creation of 10 to 13 new firms;
- (3) Total divestiture to the new firms of all crude and product pipelines which connect directly to the spinoff refineries;
- (4) Transfer of fractional ownership shares in connecting joint venture pipelines to the new firms;
- (5) A ban against future refinery acquisitions by respondents;
- (6) Limitations upon respondents' joint ventures;
- (7) Limitations upon processing arrangements whereby respondents rent independent refinery capacity; and possibly
- (8) Limitations upon crude oil and petroleum product exchanges. A. 217-221.

The Commission's assertion that these "staff" proposals are merely a tentative, speculative "general statement of

34. Within the relevant geographic market, the *Exxon* respondents own and operate 34 refineries. Thus, the divestiture proposal involves 13 to 20 discrete physical facilities in a definite geographic region.

goals" (p. 27) is contradicted by the staff's position on the relief proposed. The relief proposal (A. 217-221) first identifies four goals and then notes that "Commission counsel . . . are prepared to strongly urge the adoption of a package of *remedies which are designed to accomplish the four stated goals.*" A. 218 (emphasis added). Contrary to the Commission's present position, these proposals were represented by complaint counsel to have been arrived at "[a]fter detailed analysis of the competitive problems facing the petroleum industry" *Id.* (emphasis added).

Despite the obvious environmental implications of the structural relief proposed in *Exxon* which it does not dispute, the Commission argues that consideration of the environment must be deferred because, for example, the "identities and locations of the refineries that would be divested" are not known. (p. 30).³⁵

The Commission's professed inability to predict with certainty the precise nature of the environmental impact of the relief it proposes in no way relieves it of its obligation to file an impact statement:

"[An agency cannot] avoid drafting an impact statement simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting. . . . It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry'." *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

35. Such statements evidence a complete failure to comprehend the import of NEPA. It is precisely through preparation of an EIS at this time that the Commission will be able to ascertain those refineries, the divestiture of which would result in the least harm to the environment.

Where broad action has been proposed which would have obvious environmental consequences and where irretrievable commitments to that action are being made which would effectively preclude options, the absence of specificity in the proposed action does not excuse compliance with NEPA. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 539 F.2d 824 (2d Cir. 1976), cert. granted, 45 U.S.L.W. 3651 (U.S. March 29, 1977).

In *Natural Resources* the Nuclear Regulatory Commission ("NRC") had entered an order permitting it to grant interim commercial licenses for the use of mixed oxide fuel and related activities prior to the completion of a so-called generic environmental impact statement on uranium and plutonium mixed oxide fuel ("GESMO"). A voluminous draft GESMO had been prepared by the Commission's predecessor, the Atomic Energy Commission, prior to NRC's final decision on wide-scale use, and prior to issuance of the order in question. The CEQ expressed the opinion that the draft GESMO was, nevertheless, inadequate.

The Commission's argument that the draft EIS was adequate in light of the uncertainty as to the particular locations where the environmental impact would be felt was rejected. Quoting from *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973), the Court held:

The legislative history of the Act indicates that the term "actions" refers not only to construction of particular facilities, but includes "project proposals, proposals, for new legislation, regulations, policy statements, or expansion or revision of ongoing programs . . ." 539 F.2d at 841 n.11 (citations omitted).

In addition, the Court observed:

The growth of plutonium-related activities in recent years makes it clear that the nuclear power industry as a whole is steadily progressing towards the launching of a new era of commercial nuclear technology. Important environmental questions are

involved in the utilization of plutonium recycle. *These questions are common to the industry and transcend issues relative to the local impact of any one nuclear power plant. Id. at 842 (emphasis added).*

Restructuring of the petroleum industry obviously involves "important environmental questions" which transcend issues relevant to the specific identity and location of the refineries and pipelines to be divested. It would be anomalous indeed if the massive scope of proposed action and any lack of specificity attributable to the proposal's scope could provide a basis for avoiding the requirements of NEPA. This Court has so recognized:

The fact that the environmental effects of such a decision about a new technology will not emerge for years does not mean that the program does not affect the environment or that an impact statement is unnecessary: . . . In numerous cases involving the commercial introduction of a new technology, as well as in cases where the agency has undertaken isolated activity which the courts found to be in actuality part of a larger program, the courts have not hesitated to identify major federal action on the broader scale and to require the preparation of a regional or generic impact statement before allowing major federal action to proceed. Such broad-scale impact statements may be required for a series of major federal actions, even though individual impact statements are to be prepared for each isolated project; . . . Otherwise, agencies could take an approach "akin to equating an appraisal of each tree to one of the forest." *Id. at 841-42 (citations omitted).*³⁶

36. In *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 547 F.2d 633 (D.C. Cir. 1976), the Court rejected the agency's claim, virtually identical to the FTC's here, that the environmental consequences of its action were "too 'contingent and presently indefinable' to be evaluated and that future changes rendered any analysis 'too speculative.'" *Id. at 639.* The Court also rejected the argument that no EIS should be required since environmental impact may be considered at a later decision-

If the Commission prevails on its argument that the alleged absence of a concrete proposal precludes a meaningful EIS, a loophole would be created in NEPA which would destroy its purpose and effect. It would provide another means whereby the Commission, or any agency, could evade its NEPA responsibilities by permitting its staff to couch proposed action in vague terms until the last minute.

The Commission's position is not supported by the decision on which it places heavy reliance (p. 25), *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). In *Kleppe*, plaintiffs sought a ruling that officials within the Department of Interior and other agencies must prepare an EIS addressing "regional" (portions of 4 adjoining states) development of coal reserves. The "region" at issue was defined solely by plaintiffs. It was undisputed that no plan or proposal of this particular "regional" scope existed. Rather, proposals had been made, supported by environmental studies, encompassing less than the regional (*e.g.*, two-state) area or larger areas inclusive of the one identified by the plaintiffs (5 and 15 states, and nation-wide). From the existence of these local and supra-regional plans and proposals and from the fact that plaintiffs had requested "regional" studies, the Court of Appeals in *Kleppe* inferred that regional projects were probably "contemplated" by the defendant agencies. It therefore ordered additional findings to this effect as a basis for requiring a "regional" EIS.

The Supreme Court held that inferential identification of "contemplated" action failed to rise to the level of "proposed agency action" which triggers NEPA requirements. It also found that the defendant agencies had in fact given considerable thought to environmental concerns in developing

making stage in the project. The court's summary rejection of such a proposition could hardly have been more emphatic:

The real question posed . . . is whether the environmental effects . . . may be ignored . . . because they will later be considered . . . To answer this question any way but in the negative would be to misconstrue the fundamental purpose of NEPA. *Id.* at 640 (emphasis added).

their local and supra-regional proposals.³⁷ Cognizant of their NEPA responsibilities, defendants had prepared at least five environmental impact statements, 427 U.S. at 400 & n.10, and the Department of Interior had stated it would prepare a "regional" EIS where several proposals within a region were made. *Id.* at 411 & n.22. The Commission's failure to give *any* consideration to environmental factors in *Exxon* is in dramatic contrast to the facts in *Kleppe*.

The Court below did not infer the existence of an agency proposal for action in this case; it is documented in the record. The Commission is not engaged in idle speculation over oil-industry divestiture. The Commission (not its staff) moved beyond "contemplation" by inaugurating an investigation of the petroleum industry, by issuing the *Exxon* complaint based on the information collected in its investigation and by continuing to support this major federal action with funding in the millions of dollars.

Kleppe marks out three stages of action by an agency—contemplated, proposed and final and holds that the first does not bring NEPA into play. By seeking to come under the *Kleppe* decision, the Commission is arguing that it may skip from the first to the third step and evade NEPA by presenting a *fait accompli*. It passes off the relief proposed as a "tentative statement of contemplated relief by complaint counsel" (p. 33) and argues that "only the relief formulated by the Commission at the conclusion of the proceeding could be the proper subject of an EIS." (p. 29). The Commission thus implies that relief will still be in the "proposal" stage at that point.

37. As the Court stated:

[I]t is clear that the NGPRP [Northern Great Plains Resources Program study] was devoted entirely to the environment. It was carried out by an interagency, federal-state task force with public participation, and was designed "to assess the potential social, economic and environmental impacts" from resource development in five states. . . . Its primary objective was "to provide an analytical and informational framework for policy and planning decisions at all levels of government" by formulating several "scenarios" showing the probable consequences for the area's environment and culture from the various possible techniques and levels of resource development. 427 U.S. at 397 (footnotes omitted).

The entire argument is disingenuous. Under Commission Rules, the Commission does not propose relief once a proceeding has begun.³⁸ The rule governing the Commission's decision on appeal from the initial decision of the Law Judge (16 C.F.R. § 351) does not provide for any "proposal" relating to relief; it provides only for a final order specifying its decision. Therefore, a wait for an explicit proposal by the FTC relating to relief in *Exxon* would be an endless one.³⁹

Moreover, the Commission could completely escape its NEPA responsibilities by the simple expedient, as in *Exxon*, of failing to specify relief in the complaint, as it has a right to do, and simply *ordering* relief when the time comes. Thus, the Commission would have eliminated the "proposal" stage of federal action, that federal action would be implemented if not challenged in federal court, and the purposes of NEPA would have been effectively and totally subverted. The ordering of relief is the conclusion of the decision-making process within the agency, yet that is the point at which defendants would have consideration of NEPA begin.

In a further effort to come within the holding of *Kleppe*, the Commission implies that discovery is necessary before it could draft an EIS (pp. 28-29, 31). This argument is rationalization of the most transparent sort.

The Commission is quite capable of preparing an EIS on the basis of the relief as presently proposed. Other agencies do not need or engage in discovery in order to comply with NEPA and the same is true of its FTC. In addition, the detailed information being discovered from

38. The *Exxon* complaint itself demonstrates that, if a violation is found, the Commission will order, rather than propose, relief. The complaint states:

should the Commission conclude . . . that the respondents are in violation of Section 5 . . . the Commission may order such relief as is necessary . . . A. 215.

39. It is also possible that the relief in *Exxon* could be ordered without the Commission itself taking any formal steps since, under Rule 3.51, the initial decision of the Administrative Law Judge becomes the decision of the Commission if there is no appeal.

respondents in *Exxon* is pursuant to a program initiated at a time when the Commission had a rule precluding consideration of the environment. It is designed to establish the case for divestiture and does not bear on the environmental implications of that proposed relief.⁴⁰

Moreover, the Commission's view of the information necessary to prepare a draft EIS (pp. 30-31) is unrealistic. Normally NEPA does not require, as the Commission implies, that all conceivably relevant environmental factors be considered. As stated in *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1280 (9th Cir. 1973):

Neither 102(2)(B) or (C) can be read as a requirement that complete information concerning the environmental impact of a project must be obtained before action may be taken. If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated.⁴¹

The Commission can comply with its statutory duties under NEPA without discovery and an EIS may be prepared at this stage of the proceedings.

40. The Commission's reliance on *Environmental Defense Fund, Inc. v. Morton* ("EDF"), 420 F. Supp. 1037 (D. Mont. 1976) (pp. 33-34) is also misplaced. As in *Kleppe*, EDF involved an earlier stage of agency action than that which the Court below has determined must be the subject of an EIS. The Court recognized that "[o]nce a specific proposal is presented for use of the water, then a thorough, detailed environmental impact statement must be prepared." 420 F. Supp. at 1049. *Exxon* has reached that stage. The Commission has specifically proposed divestiture and other relief.

41. Lack of technical information and technique is a deficiency which is appropriately addressed in an EIS. *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749, 758 (E.D. Ark. 1971):

The NEPA does not require the impossible. . . . It would suffice if the agency pointed out this deficiency. The decision-makers could then determine whether any purpose would be served in delaying the project while awaiting the development of such criteria.

C. The Requirements Of Section 102(2)(C) May Not Be Evaded By An Artificial Separation Of The Commission From Its Staff

Next the Commission contends that preparation of an EIS must be postponed because "there has not been any proposal of relief by the Commission in *Exxon*" and that "it was only a tentative statement of contemplated relief by complaint counsel . . ." (p. 31).

The FTC's efforts to disassociate itself from its staff completely fail and the analogy on which the FTC relies proves the point:

[O]ne can no more attribute statements of complaint counsel to the Commission than one can attribute statements of a federal prosecutor to the Court. (p. 34).

However, unlike a court, the Commission instituted the investigation which preceded the issuance of the *Exxon* complaint, it issued and declined to withdraw the complaint, it will finally order relief in that proceeding and will be the defendant in federal court should the *Exxon* respondents challenge the relief which is ordered.⁴²

42. There are numerous cases where an EIS has been required or NEPA has been found applicable based on action taken by the staff of an agency without on the record or formal approval by the agency head. In each instance, as here, the staff acted within the broad authority of the agency. See, e.g., *Sierra Club v. Mason*, 351 F. Supp. 419 (D. Conn. 1972). Neither *Kleppe* nor *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 531 F.2d 637, 639-40 (2d Cir. 1976), cited by the Commission (p. 33) in support of its "agency vs. staff" distinction even raised the issue.

The artificial distinction which the Commission draws between itself and its staff is not supported, as the Commission contends (p. 34), by analogy to Exemption 5 of the Freedom of Information Act, ("FOIA"), 5 U.S.C. § 552(b)(5), as discussed in *Sterling Drug, Inc. v. Federal Trade Commission*, 450 F.2d 698 (D.C. Cir. 1971). Exemption 5 was designed to encourage intra-agency discussion whereas § 102(2)(C) was designed to require an EIS whenever an agency—whether through its staff or otherwise—engages in "major federal action significantly affecting the human environment." The rationale for the *Sterling Drug* decision is that the policy behind the FOIA supports Exemption 5: "We are primarily motivated by our belief that there is a great need to preserve the free flow of ideas" within an agency. *Id.* at 708. Thus, the question of what documents are exempt from disclosure under the FOIA has no bearing at all on the issue of when NEPA must be complied with.

Furthermore, the Commission's attempt to characterize divestiture as nothing more than a staff proposal and one of a variety of forms of relief which it might consider should a violation be found is directly contrary to the facts.

Since respondents are charged with having "maintained and reinforced a non-competitive market structure" (A. 208), it is apparent that changes in that structure are contemplated. *Exxon* is generally recognized as a "structural" case, the objective of which is divestiture, as confirmed by the fact that the Assistant U.S. Attorney, arguing against an injunction below, repeatedly referred to *Exxon* as the Commission's "divestiture proceeding". A. 152, 153, 154, 160, 166, 167. More importantly, the Commission has endorsed the goal of this proceeding as articulated by its staff.

On October 17, 1975, the Administrative Law Judge, *sua sponte*, certified to the Commission his recommendation that the Commission consider withdrawal of the *Exxon* complaint. A. 233-248. In his certification after setting out in detail complaint counsel's divestiture proposals, the Administrative Law Judge stated that significant changes had taken place in the industry subsequent to issuance of the complaint and asked the Commission to consider whether the adjudication, *particularly including the proposed relief*, was consistent with national policy in resolving the energy crises. He stated:

Involved are not merely changes since issuance of the complaint which pertain to the allegations of the complaint and underlying theories (which will be developed later) but questions of (1) whether it would be in the public interest to pursue a case of the present magnitude which is not directed to the energy shortage problem and (2) whether the present proceeding *and the relief proposed* or available to the Commission is, or may be, consistent with public policy in resolving what is one of the most crucial issues this nation has ever faced. A. 235-36 (emphasis added).

On October 23, 1975, the Commission issued an order⁴³ in which it determined that the complaint should not be withdrawn. This implicit endorsement of the proposed relief by the Commission was underscored by the dissent of Commissioner Nye:

I believe that [withdrawal of the *Exxon* complaint] is what the Commission should do in this case. *The concept which is central to the Commission's complaint is that the best way to lower the price of petroleum products sold in the United States is to break up eight large oil companies operating in the Eastern United States into separate production, transportation, refining, and marketing entities.* The effort to do so now represents the largest single expenditure of Commission resources, with a commitment for fiscal year 1976 of \$2.4 million. . . .

I would like very much to know whether [the OPEC embargo and resultant massive increase in oil prices] makes the relief proposed in this case no longer in the public interest. . . .⁴⁴

In addition, the Commission's own Rules, 16 C.F.R. §§ 1.81-1.86, belie the argument that an EIS is not triggered until the Commission acts. In those rules, the Commission acknowledges that NEPA requirements may indeed be activated before the Commission itself makes a final decision. Rule 1.82(a) declares the policy:

No Commission rule or guide which is a major action significantly affecting the environment will be promulgated unless an environmental impact statement *has been prepared for consideration in the decisionmaking.* (emphasis added).

The rules implementing this explicit policy declaration ensure that, in the case of rules or guides, an EIS is drafted, circulated to other agencies and the public, then put in final form and circulated again *before* any action is taken by the Commission. Rules 1.83-1.86. They specifically bring proposals from the *staff* within NEPA. Rule 1.83(a) states:

43. See note 9, *supra*.

44. Dissent of Commissioner Nye to Commission Order of October 23, 1975, at 2, (emphasis added). Trowbridge Affidavit Ex. C.

Staff proposals recommending the initiation of a rule or guide proceeding, as well as staff evaluations of legislative proposals and legislative reports in an area where the Commission has primary responsibility, shall include an assessment of the anticipated environmental impact, based on CEQ Guidelines, § 1500.6(a))(b). (emphasis added).

Thus, these rules require that compliance with NEPA must begin while proceedings are at the staff level and that, while they are still at that level, the draft and final EIS must be placed in the record. Rule 1.83(b)-(d). The Commission considers the draft EIS, along with comments submitted in response to its circulation, and puts the EIS in final form, attaching the comments. Rule 1.84(a).

The Commission thus recognizes that action proposed by the staff is a "proposal" within the meaning of NEPA requiring compliance with that statute. It therefore cannot be heard to claim that, as regards a different type of action, a proposal initiated by the staff is not one by the agency. The argument to that effect is without substance and again exposes the Commission's intention to do whatever it takes to defer compliance with NEPA until relief is ordered and compliance is no longer possible.

D. Delay In The Preparation Of An EIS Until Relief Is Ordered Will Result In An Irreversible And Irretrievable Commitment Of Resources.

The Commission's final argument in attempting to postpone compliance with NEPA is that the District Court erred in concluding "that unless an EIS were prepared at this stage of *Exxon*, an irreversible and irretrievable commitment of resources would have been made precluding meaningful consideration of environmental issues by the time the Commission were to formulate a [remedy]." (p. 35). The Commission asserts that "[i]nstead of following the guidance of the Supreme Court and the language of the statute, the District Court appeared to use a balancing test in reaching its decision that an EIS is required even before the agency issues its complaint." (p. 36).

Again, the Commission completely misstates the basis of the District Court's holding. Relying on the express language of § 102(2)(C) the Court concluded:

[At] the relief stage of an enforcement proceeding there is too great a tendency to accept as inevitable adverse environmental consequences, thereby nullifying their input into the decision-making process.

Moreover, without being subject to the dictates of § 102(2)(c), there is a danger that the Commission will wrongly assume that enforcement proceedings are exempt as well from the more general directives of NEPA. Under such circumstances, the FTC will have no incentive to heed the respondents' warnings concerning the environment, assuming that its sole mission is to enforce the antitrust laws, and the very purpose of NEPA will have been defeated. A. 110.

The District Court properly perceived that it was for the FTC, not the Court, to balance the competing interests of the FTCA and NEPA:

The Court recognizes that its ruling today may signal an occasional decision not to prosecute antitrust violators for the sake of preserving our environment. It must be remembered, however, that the decision whether to go forward notwithstanding adverse environmental impact rests with the Commission. *It is their obligation, not the Court's, to weigh alternatives.* A. 111 (emphasis supplied).

The holding below was in complete accord with this Court's holding in *Natural Resources*, *supra*, that the commitment of substantial resources,

before the completion of the environmental impact analysis has been branded as making a "mockery" of the procedural mandates of NEPA; see *Natural Resources Defense Council, Inc. v. Callaway*, *supra*, 524 F.2d at 92. As the court stated in *Scientists' Institute*, *supra*,

"by the time commercial feasibility of the technology is conclusively demonstrated, and the effects of application of the technology certain, the purposes of NEPA will already have been thwarted. Substantial investments will have been made in development of the technology and options will

have been precluded without consideration of environmental factors. (481 F.2d at 1093-94).” 539 F.2d at 844.

The Commission’s suggestion (pp. 35-36) that the approach taken by the District Court is in conflict with the Supreme Court’s decision in *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289 (1975) (“*SCRAP II*”) cannot be supported. In *Natural Resources*, *supra*, this Court distinguished that case:

In that case, the Court allowed the Interstate Commerce Commission to proceed to grant “interim” railroad freight rate increases pending its completion of a NEPA study of the ICC’s entire rate structure on the question of whether the rate structure discriminated against shipment of recyclables. The Supreme Court noted that the interim increase was “entirely nonfinal” and that it was facially neutral in its own environmental impact. *SCRAP* therefore involved no irreversible commitments of resources; in fact a rate increase involves almost no commitments of resources.

This is not a case where the proposed activity has independent utility; or where the proposed interim activity is “substantially independent” of the issue of wide-scale use. Rather, the interim activity is clearly tied to the anticipated wide-scale use and would commit substantial resources to the mixed oxide fuel technology. *Id.* 539 F.2d at 844 (citations omitted).

These distinctions apply with equal force to this case.

The Commission’s reliance on *SCRAP II* is misplaced for an additional reason. In *SCRAP II*, certain railroads had filed for new rates with the Interstate Commerce Commission and plaintiffs asserted that such a filing activated the EIS requirements of NEPA. The Supreme Court held that a proposal for major federal action made by such *private* parties did not yet constitute an *agency* proposal triggering NEPA, and explicitly recognized the distinction between agency and private initiation of proposals:

Where an *agency* initiates federal action by publishing a proposal and then holding hearings on the

proposal, the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing. Here, *however*, . . . the ICC had made no proposal, recommendation or report. The only proposal was the proposed new rates filed by the railroads. 422 U.S. at 320 (emphasis added).

In this case, unlike *SCRAP II*, it is the Commission, not a private party, which has initiated its own proposal for federal action. When an agency initiates its own proposals, NEPA responsibilities have been delineated as follows:

When the federal agency is initiating its own proposal, NEPA is more demanding. In such circumstances, NEPA is "intended to assure (environmental) consideration during the development of (the) proposal," whereas when private action is to be approved, NEPA seeks only to assure such consideration "during the formulation of a position on [the] proposal submitted by private parties". *Kleppe v. Sierra Club*, *supra*, 427 U.S. at 419 n.1 (Marshall, J., concurring and dissenting in part, with Brennan, J.).

For the same reason, the Commission's reliance on *SCRAP II* in an effort to overcome this Court's holdings in *Harlem Valley Transportation Ass'n v. Stafford*, 500 F.2d 328 (2d Cir. 1974) and *Greene County Planning Board v. Federal Power Comm'n*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972), as well as the D.C. Circuit's decision in *Calvert Cliffs'*, *supra*, (p. 38) is equally unavailing. The *SCRAP II* Court's disapproval of those holdings extends only to an EIS requirement for *private* proposals prior to an agency recommendation or report on such proposals. 422 U.S. at 321 n.20. The rationale of *Harlem Valley*, *Greene County* and *Calvert Cliffs'*, that an EIS must accompany a proposal through the agency review process, remains undiminished with respect to *agency* initiated proposals for federal action.

The District Court's conclusion that further delay in the preparation of an EIS would, contrary to the express policy of NEPA, result in an "irretrievable and irreversible commitment of resources" is well grounded and consistent with

other decisions of this and other Circuits. In *New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 754 (2d Cir. 1977), Judge Waterman observed:

[W]hen massive resources are committed to and are expended on a project without any forethought having been given to its environmental impact, modification of that project is unlikely despite the fact that undesirable environmental consequences are disclosed by the EIS when it is ultimately drafted.⁴⁵

If the preparation of an EIS is postponed until the conclusion of the *Exxon* proceeding, it is inconceivable that a meaningful impact statement would be prepared or that it could perform its statutory function. If, after the finding of a violation, plaintiffs sought to raise environmental questions as to proposed divestiture, it would simply be unrealistic to assume that the Commission would cooperate in letting them do so or that such belated consideration of NEPA requirements would be as useful as a continuing program of environmental analysis running throughout earlier proceedings.

The Commission's steadfast refusal to prepare an impact statement in *Exxon* and its own rule which provided that it need not do so are strong indications that the environment will receive short shrift if the Commission has its way.

An environmental analysis which began only after all of the findings of violation had already been made would be both restricted and wasteful. It could only relate to what had taken place, as opposed to playing a part in shaping the final result of the administrative proceeding. In addition, the strong temptation would be to make such a statement, following the finding of a violation, the sort of "*post hoc*" environmental rationalizations of decisions already

45. The D.C. Circuit's opinion in *Scientists' Institute, supra*, makes it clear that preparation of an EIS is required at the early stages of proposed action not only because options are foreclosed by the commitment of federal resources to a particular alternative but also because vested bureaucratic interests, which result in a *de facto* foreclosure of meaningful environmental consideration, are also developed as agency proposals are enacted. 481 F.2d at 1089 n.43.

fully and finally made" which so concerned the court in *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 511 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 937 (1975).

An analysis commencing instead at the initial fact-finding stage, however, could focus upon which allegations of restraint and incipient restraint of competition should lead to what types of possible relief and what types of physical impact. This sort of analysis, in turn, would aid the Commission, the respondents in *Exxon*, the public and other interested bodies to explore alternatives before the situation was confined to particular findings. If, for example, an environmental impact of disastrous dimensions were found for a certain type of relief, then different factual inquiries and relief proposals could be made. Such flexibility would be impossible if preparation of an EIS is postponed until after a violation is found.

The Commission's arguments that (a) the relief proposed in *Exxon* is presently "not concrete" and too "speculative"; (b) the staff rather than the Commission has proposed the relief in *Exxon*; and (c) there will be no irreversible or irretrievable commitment of resources in *Exxon* provide no basis for reversing the District Court's order that the Commission begin complying with § 102(2)(C) "immediately" by preparing an EIS.

IV

PLAINTIFFS HAVE SUSTAINED INJURY IN FACT WHICH IS WITHIN THE ZONE OF INTERESTS TO BE PROTECTED BY NEPA AND HAVE STANDING TO MAINTAIN THIS ACTION

The Commission contends that plaintiffs lack standing to maintain this action because they have failed to demonstrate the requisite "injury in fact" (pp. 41-42) and that such injury is "within the zone of interests to be protected or regulated by NEPA." (pp. 42-44). It argues that the injury found by the District Court is "too remote and speculative to satisfy the requirements of injury in fact" (p. 41), and that plaintiffs' alleged interest in delay "is not

within the zone of interests to be protected or regulated by NEPA" (p. 42). In support of this latter point, the Commission again relies on *Gifford-Hill, supra*.

These arguments are at odds with the findings of the District Court and applicable precedent. The Court below properly concluded that "by virtue of their status as oil companies, plaintiffs have a stake in our nation's environment." A 78. Plaintiffs and their employees will have the greatest exposure to the environmental consequences that will result from the Commission's *Exxon* relief proposals. Like the plaintiffs in the *National Helium* case, *infra*, plaintiffs here will be most immediately affected by increased or decreased depletion of scarce natural resources and their public and commercial relations will suffer from the environmental damage.

The alleged "remoteness" of plaintiffs' injury does not defeat their standing. As the Court below held:

The fact that a particular proposal might be abandoned somewhere along the reviewing road has never justified postponing environmental considerations until a final decision has been reached. See, e.g., *Greene County Planning Bd. v. FPC*, 445 F.2d 412, 418-22 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).⁴⁶ A. 90.

The Commission's attempt to demonstrate that plaintiffs' interest in this action is not within the zone of interests protected by NEPA is based on a false premise. Contrary to the Commission's implication (p. 42), the Court below did not "recognize" that the plaintiffs' "interest herein is [solely] to delay and avoid enforcement of the Federal

46. This reasoning of the Second Circuit cited by Judge Cannella was not questioned by the Supreme Court in *Aberdeen & Rockfish R. R. v. SCRAP*, 422 U.S. 289 (1975), wherein the Court interpreted the provision in NEPA that the EIS "shall accompany the proposal through the existing agency review process" as affecting only what must be done with an EIS once it is prepared. Moreover, the Supreme Court in *United States v. SCRAP*, 412 U.S. 669 (1973) ("SCRAP I") found standing under conditions where the injury to plaintiffs (decreased use of recyclable commodities as a result of increased rates) was far more speculative than the injury to plaintiffs here.

Trade Commission Act." (Citing A. 173). A fair reading of the Court's remarks is that *notwithstanding* plaintiffs' legitimate interest in the environment, the Court would not lose sight of the delay that would result if *Exxon* were enjoined until an EIS was prepared. The District Court in fact found that plaintiffs' interest in this action is other than delay, and the Commission's reliance on *Gifford-Hill*, *supra*, is again misplaced.

Plaintiff in *Gifford-Hill*, without first moving in the administrative proceeding for compliance with NEPA, brought an action in district court to dismiss the Commission's complaint or to enjoin the adjudicative proceeding pending such compliance.

The District Court and Court of Appeals found that *Gifford-Hill*'s alleged injury was nothing more than its cost of defending a Commission proceeding and the risk of an adverse decision. Such an interest, however, is not even "arguably within the zone of interests to be protected by NEPA." A. 84.

Plaintiffs here do not base their right to bring the instant action on the costs of litigating *Exxon*. Their standing arises from their undisputed interest in vital and limited natural resources which, *inter alia*, would be depleted on an accelerated basis as a result of the relief proposed in *Exxon*. This is in sharp contrast to the *Gifford-Hill* situation and impact on environment, a demonstrable factor here, was not present in *Gifford-Hill*.

Despite the Commission's argument to the contrary, (pp. 43-44), *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971), is a leading authority on the issue of "commercial" NEPA plaintiffs' standing to sue. The plaintiffs in *National Helium* were a gas company and two oil companies who sued to enjoin the Secretary of the Interior from cancelling a contract for the purchase of helium without filing an EIS. The Court in *Helium* noted both the lower court's view that "it was 'passing strange' to see the giants of the oil and gas industry representing the public interest," and its conclusion that "they were not *per se* disqualified to

occupy this role . . ." 455 F.2d at 654. The Court affirmed plaintiffs' standing to enforce NEPA in vigorous terms:

We are unable to say that the companies are motivated solely by protection of their own pecuniary interest and that the public interest aspect is so infinitesimal that it ought to be disregarded altogether. It is not part of our function to weigh or proportion these conflicting interests. Nor are we called upon to determine whether persons seeking to advance the public interest are indeed conscientious and sincere in their efforts. True, the plaintiffs are not primarily devoted to ecological improvement, but they are not on this account disqualified from seeking to advance such an interest. No group has a monopoly on working for the public good. *Id.* at 655.

The Commission's reliance on *Gifford-Hill* to distinguish *National Helium* as an APA standing case is misplaced since plaintiffs here have standing under both NEPA and the APA. In contrast to *Gifford-Hill*, where plaintiff had filed its action a few days after issuance of the FTC complaint, plaintiffs here presented their NEPA claims to the Administrative Law Judge and pursued their claim through the Commission before filing this action. The denial of the NEPA claim is thus "final agency action" under 5 U.S.C. § 704 and plaintiffs qualify as "a person suffering legal wrong because of agency action" under 5 U.S.C. § 702.

Other courts have also accorded standing to corporate plaintiffs who might be considered to be more prominently identified with business than with environmental concerns. In *Louisiana v. Federal Power Commission*, 503 F.2d 844, 849 (5th Cir. 1974) it was held that plaintiffs had standing despite the court's observation that it was

presented with the interesting spectacle of industrial giants using environmental legislation to frustrate a consumer-oriented agency's attempt to protect another industrial giant.

In *Chemical Leaman Tank Lines, Inc. v. United States*, 368 F. Supp. 925, 947 (D. Del. 1973) the court overruled objec-

tions to the plaintiff's supposedly overriding pecuniary interest and was persuaded by the contrary position taken in *National Helium*:

[the ICC] submits that private corporations like the plaintiffs, who sue primarily to protect their pecuniary interests, have no standing to enforce the Commission's obligations under NEPA. An identical assertion was rejected by the Tenth Circuit in [*National Helium*]. The court employed reasoning that is both apposite and persuasive here:

It cannot be denied that the (plaintiff) companies have a genuine substantial financial interest in the termination of the (challenged) contract. But it is their asserted representation of the public interest—which from their personal standpoint is admittedly less important than their private financial stake—which in final analysis justifies their seeking judicial review. . . .⁴⁷

368 F. Supp. at 947

Plaintiffs have alleged injury in fact, their interest in the environment is within the zone of interests to be protected by the broad reach of NEPA and they have standing to maintain this action.

47. See also, *Robinson v. Knebel*, 550 F.2d 422, 425 (8th Cir. 1977); *Pack v. Corps of Engineers*, 428 F. Supp. 460, 464-65 (M.D. Fla. 1977); *Duke City Lumber Co. v. Butz*, 382 F. Supp. 362 (D.D.C. 1974), *aff'd*, 539 F.2d 220 (D.C. Cir. 1976), *cert. denied*, 45 U.S.L.W. 3463 (U.S. January 11, 1977).

Conclusion

The decisions of the District Court should be affirmed.

Dated: New York, New York
July 29, 1977

Respectfully submitted,

Of Counsel:

CHARLES F. RICE
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017

Of Counsel:

GEORGE W. WOLBERT
S. R. VANDIVORT
A. M. MINOTTI
Shell Oil Company
One Shell Plaza
Houston, Texas 77001

ANDREW J. KILCARR
VINCENT TRICARICO
Donovan Leisure Newton & Irvine
1666 K Street, N.W.
Washington, D.C. 20006

THOMAS R. TROWBRIDGE III
Donovan Leisure Newton & Irvine
30 Rockefeller Plaza
New York, New York 10020

Counsel for Appellee
Mobil Oil Corporation

J. WALLACE ADAIR
KEITH E. PUGH, JR.
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Counsel for Appellee
Shell Oil Company

JESSE P. LUTON, JR.
JOHN E. BAILEY
P.O. Box 2100
Houston, Texas 77001

Counsel for Appellee
Gulf Oil Corporation

GEORGE A. SEARS
RICHARD W. ODGERS
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California 94104

Counsel for Appellee
Standard Oil Company of California

Service of three (3) copies of
the within *Brief* is hereby admitted this
29th day of *July*, 1977

Attorney fee

COPY RECEIVED

Robert B. Fiske Jr.
UNITED STATES ATTORNEY

7/29/77
Marion F. Bryant

